(1)
Supreme Court, U.S.
FILED
02 940 DEC 16 2002
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KRISTIN MADDOX,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT R. BODOIN
Counsel of Record

BODOIN, BURNSIDE & BURGE, P.C.
6115 CAMP BOWIE BOULEVARD
SUITE 290
FORT WORTH, TX 76116
(817) 377-4886

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

49 pp

QUESTIONS PRESENTED

1. Whether, absent a directive by Congress to the contrary, federal courts are obligated to apply federal choice of law rules in all cases where the federal courts' jurisdiction is based upon a federal question.

2. Whether, under this Court's holding in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), a federal court with federal question jurisdiction over an aviation case under the Warsaw Convention is obligated to (a) follow federal choice of law rules in all cases, as held by the Sixth Circuit (b) follow the choice of law rules of the state in which suit was filed in all cases, as held by the Second and Ninth Circuits, or (c) follow either federal choice of law rules or forum state choice of law rules based on the facts of each case, as held by the Eighth Circuit below.

3. Whether, in the face of an enforceable choice of law stipulation by the parties as to damages issues, a federal court can apply a different law for prejudgment interest than the stipulated law applied to other damages issues, as did the Eighth Circuit below, splitting with the Second and Tenth Circuits.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Kristin Maddox, an individual citizen of the United States. At the time her claims arose, Petitioner was a domiciliary of Oklahoma; she currently resides in New York. Petitioner has no corporate affiliations. Petitioner Kristin Maddox was the Plaintiff in the District Court and the Appellant in the Eighth Circuit Court of Appeals.

Respondent

Respondent American Airlines, Inc. is a wholly-owned subsidiary of AMR Corporation, which is publicly traded. Petitioner is unaware of any publicly held company owning ten percent (10%) or more of AMR Corporation's stock. Respondent American Airlines was the Defendant in the District Court and the Appellee in the Eighth Circuit Court of Appeals.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table to Contents iii

Table of Cited Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Treaty Involved 1

Statement of the Case 1

Reasons for Granting the Petition 3

I. A Split among the Circuits Exists Concerning the Interpretation and Application of this Court's Holding in *Zicherman v. Korean Air Lines Co.* 3

II. The Decision of the Eighth Circuit is Incorrect because Federal Choice of Law Rules Apply in Federal Question Cases 7

III. The Decision of the Eighth Circuit is Incorrect and Splits with Decisions of the Second and Tenth Circuits Concerning the Effect of Parties' Choice of Law Stipulations 13

IV. The Questions Presented are Important for Maintaining a Uniform Choice of Law Analysis in Warsaw Convention Cases and Other Federal Question Cases 16

Conclusion 20

Appendix

Appendix A
Court of Appeals Order Denying Petitions for Rehearing, 9/16/02 . . . . . 1a

Appendix B
Court of Appeals Opinion, 8/1/02 . . . . . 2a

Appendix C
District Court Order, 9/25/00 . . . . . 14a

TABLE OF CITED AUTHORITIES

Cases:

American Home Assurance Co. v. L&L Marine Serv., Inc.,
153 F.3d 616 (8th Cir. 1998) 8, 10

Bickel v. Korean Air Lines Co.,
83 F.3d 127 (6th Cir. 1996),
vacated in part on separate issue, 96 F.3d 151,
cert. denied, 519 U.S. 1093 (1997) . . . . . *passim*

Brink's Ltd. v. South African Airways,
93 F.3d 1022 (2nd Cir. 1996) 6

Brotherhood of Locomotive Engineers v. Springfield Terminal Ry. Co.,
210 F.3d 18 (1st Cir. 2000),
cert. denied, 531 U.S. 1014 (2000) 8

Cappello v. Duncan Aircraft Sales of Florida, Inc.,
79 F.3d 1465 (6th Cir. 1996),
cert. denied, 519 U.S. 980 (1996) 14

Carney v. State Farm Mut. Auto. Ins. Co.,
877 P.2d 1113 (Okla. 1994) 12

Caruolo v. John Crane, Inc.,
226 F.3d 46 (2nd Cir. 2000) 14

Chuidian v. Philippine Nat'l Bank,
976 F.2d 561 (9th Cir. 1992) 8, 10

Detroit Edison Co. v. Pacific Ins. Co.,
742 F.Supp. 287 (M.D.N.C. 1990) 8

Duncan v. Cessna Aircraft Co.,
665 S.W. 2d 414 (Tex. 1984) 18

Eastern Airlines, Inc. v. Floyd,
499 U.S. 530 (1991) 19

Edelmann v. Chase Manhattan Bank,
861 F.2d 1291 (1st Cir. 1988) 9, 10

El Al Israel Airlines, Ltd. v. Tseng,
525 U.S. 155 (1999) 19, 20

Erie R.R. Co. v. Tomkins,
304 U.S. 64 (1938) 6, 9

Fleming v. Baptist Gen. Convention of Okla.,
742 P.2d 1087 (Okla. 1987) 12

Gluck v. Unisys Corp.,
960 F.2d 1168 (3rd Cir. 1992) 8, 10

Hystro Products, Inc. v. MNP Corp.,
18 F.3d 1384 (7th Cir. 1994) 11

In re Holiday Airlines Corp.,
620 F.2d 731 (9th Cir. 1980),
cert. denied, 449 U.S. 900 (1980) 8

In re Kaiser Steel Corp.,
87 B.R. 154 (Bankr. D. Colo. 1988) 12

In re Lindsay,
59 F.3d 942 (9th Cir. 1995),
cert. denied, 516 U.S. 1074 (1996) 8

Insurance Co. of North America v.
Federal Express Corp.,
189 F.3d 914 (9th Cir. 1999) 5-7, 9, 19

Johnson v. Continental Airlines Corp.,
964 F.2d 1059 (10th Cir. 1992) 14-16

Klaxon Co. v. Stentor Elec. Mfg. Co.,
313 U.S. 487 (1941) 6, 7, 9, 18

Maddox v. American Airlines, Inc.,
115 F. Supp.2d 993 (E.D. Ark. 2000) 1

Maddox v. American Airlines, Inc.,
298 F.3d 694 (8th Cir. 2000) 1

Monessen Southwestern Ry. Co. v. Morgan,
486 U.S. 330 (1988) 13-14

Pescatore v. Pan Am. World Airways, Inc.,
97 F.3d 1 (2nd Cir. 1996) 5-7, 17, 19

Pfizer Inc. v. Elan Pharmaceutical Research Corp.,
812 F. Supp. 1352 (D. Del. 1993) 8

Richards v. U.S.,
369 U.S. 1 (1962) 10

Van Dusen v. Barrack,
376 U.S. 612 (1964) 18

Vasina v. Grumman Corp.,
644 F.2d 112 (2nd Cir. 1981) 15, 16

Winter v. Cerro Gordo Co. Conservation Bd.,
925 F.2d 1069 (8th Cir. 1991) 14

Zicherman v. Korean Air Lines Co.,
516 U.S. 217 (1996) . . . . . *passim*

Statutes:

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

49 U.S.C. § 40105 1

Other:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland on October 12, 1929 ("Warsaw Convention"), 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 (1934), reprinted at note following U.S.C. § 40105 (1997). . . . . *passim*

Restatement (Second) of Conflict of Laws § 6 10

Restatement (Second) of Conflict of Laws § 122 . . 11, 12

Restatement (Second) of Conflict of Laws § 188 10

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit opinion (App. B at 2a) is reported at 298 F.3d 694 (8th Cir. 2002). The District Court opinion (App. C at 14a) is reported at *Maddox v. American Airlines, Inc.*, 115 F. Supp. 2d 993 (E.D. Ark. 2000).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on August 1, 2002. The Court of Appeals entered an order denying a timely petition for rehearing *en banc* and rehearing by the panel on September 16, 2002 (App. A at 1a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY INVOLVED

This case involves the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland on October 12, 1929 ("Warsaw Convention"), 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 (1934), reprinted in note following 49 U.S.C.A. § 40105 (1997).

STATEMENT OF THE CASE

Kristin Maddox brought this action against American Airlines, Inc. after sustaining injuries in the crash of

American Airlines Flight 1420 in Little Rock, Arkansas, on June 1, 1999. The district court had federal question jurisdiction based on 28 U.S.C. § 1331 because, at the time of the crash, Maddox was a passenger on an international flight whose claims arose under the Warsaw Convention, as supplemented by agreements incorporated into American's tariffs and conditions of carriage.

In its tariffs, American incorporated an agreement that required that "recoverable compensatory damages" in this case be determined by reference to the law of Oklahoma, Maddox's domicile (the "Agreement"). Additionally, prior to trial, American stipulated that "Oklahoma law applies to damages issues in this lawsuit" (the "Stipulation").

The district court entered judgment in favor of Maddox on the jury verdict, awarding the compensatory damages found by the jury under Oklahoma law. Maddox moved to amend the judgment, in part, to award prejudgment interest in accordance with Oklahoma law. American urged the district court that Arkansas choice of law rules and Arkansas substantive law applied to the issue of prejudgment interest regardless of the parties' stipulation, and that, under Arkansas law, prejudgment interest is not recoverable in personal injury cases. The district court agreed with American and denied Maddox's motion.

Maddox appealed the district court decision to the United States Court of Appeals for the Eighth Circuit. Maddox argued that the district court erred in conducting a choice of law analysis in the first place because the Agreement and the Stipulation had chosen the applicable law for prejudgment interest. Maddox further argued that, assuming *arguendo* a choice of law analysis was necessary, the district court erred in applying Arkansas choice of law

rules instead of federal choice of law rules. Under federal choice of law rules which apply to federal question cases and track the Restatement (Second) of Conflict of Laws, Maddox would clearly have been entitled to prejudgment interest provided for by Oklahoma law, because Oklahoma law governed the damages on which the interest accrued.

The three-judge panel assigned to the case ruled against Maddox. The panel found that the district court was correct in conducting a choice of law analysis, and the panel split with other circuits and found that the district court was correct in applying Arkansas's choice of law rules rather than federal choice of law rules to the issue of prejudgment interest.

Maddox timely petitioned the Eighth Circuit for rehearing *en banc*, and her Motion was denied on September 16, 2002.

REASONS FOR GRANTING THE PETITION

I. A Split among Circuits Exists Concerning the Interpretation and Application of this Court's Holding in *Zicherman v. Korean Air Lines Co.*

In *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996), this Court concluded that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules."

A split among the circuits exists concerning the interpretation of the foregoing holding in *Zicherman*. The Sixth Circuit has interpreted *Zicherman* as requiring the consistent application of federal choice of law rules in Warsaw Convention cases; the Second and Ninth Circuits have interpreted *Zicherman* as requiring the consistent application of choice of law rules of the state in which the Warsaw case was first filed; and, the Eighth Circuit below has now interpreted *Zicherman* as calling for federal courts to apply state choice of law rules in some Warsaw cases, but federal choice of law rules in other Warsaw cases, based upon the facts of the case.

In *Bickel v. Korean Air Lines Co.*, 83 F.3d 127 (6th Cir. 1996), *vacated in part on separate issue*, 96 F.3d 151, *cert. denied*, 519 U.S. 1093 (1997), the Sixth Circuit explained:

> To answer the choice of law question presented by these [*i.e.*, Warsaw Convention] cases, we apply a federal choice of law rule. In doing so, we are mindful that there is "no federal general common law." The Warsaw Convention, however, embodies a concrete federal policy of uniformity and certainty which would be undermined by the use of state choice of law rules. Consequently, we are of the view that these cases present precisely the type of situation in which it is appropriate to craft a special federal rule which, in these cases, is a choice of law rule.

Id. at 130 (citations omitted). *See also id.* at n.2 ("Nothing in the Supreme Court's recent *Zicherman* opinion suggests that crafting a special federal choice of law rule in these cases

is inappropriate. Indeed, the *Zicherman* Court did not have to address this question because of the parties' stipulation . . . . *Zicherman*'s ruling . . . lends weight to our conclusion that the use of state choice of law rules is not appropriate.") (citations omitted).

In *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (2nd Cir. 1996), the Second Circuit, after acknowledging the general rule that federal courts are to apply federal choice of law rules in federal question cases, nonetheless held:

> In this case, because the Warsaw Convention functions as a "pass-through, authorizing us to apply the law that would govern in [the] absence of the Warsaw Convention," we believe that application of the forum state's choice of law principles rather than the federal common law rule better effectuates the Convention's overall intent.

Id. at 12-13 (citations omitted). *See also id.* at 9, *quoting Zicherman*, 516 U.S. at 229 ("The Supreme Court has now held that the Warsaw Convention provides no independent authority for the imposition of a special federal rule: 'The Convention itself contains no rule of law governing the present question; nor does it empower us to develop some common-law rule--under cover of general admiralty law or otherwise--that will supersede the *normal federal disposition*.'") In *Insurance Company of North America v. Federal Express Corporation*, 189 F.3d 914 (9th Cir. 1999), the Ninth Circuit also construed *Zicherman* to require that the forum state's choice of law rules be applied in Warsaw cases "because the Supreme Court has 'admonished lower courts to refrain from developing federal common law 'under cover' of

advancing the goal of uniformity in Warsaw Convention cases.'" *Id.* at 920-21, *quoting Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1029 (2nd Cir. 1996) (*quoting Zicherman*, 516 U.S. at 229). Thus, the Ninth Circuit admonished that *Zicherman* requires federal courts to follow the *Erie* doctrine and *Klaxon* by applying the choice of law rules of whatever state the lawsuit was filed in originally, thus treating a Warsaw Convention case more like a diversity jurisdiction case instead of a federal question case. *Id.* at 919-20 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), & *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).).

The Eighth Circuit below followed neither approach, instead holding that, under *Zicherman*, application of federal choice of law rules is required in some cases, but that application of forum state choice of law rules is required in others, depending on the facts of the case. As applied to the facts of Ms. Maddox's case, the Eighth Circuit determined that application of state choice of law rules was required. The Eighth Circuit denied the existence of a circuit split, suggesting that "[t]he 'contrary' Sixth Circuit case [*i.e.*, *Bickel*] simply presented a different factual scenario." App. B at 10a.

Contrary to the Eighth Circuit's suggestion below, neither the Sixth Circuit in *Bickel*, the Second Circuit in *Pescatore*, nor the Ninth Circuit in *Insurance Company of North America* stated anything other than irreconcilable bright-line rules. None of the prior decisions can be construed as holding that federal choice of law rules are required in some cases, while the state choice of law rules applicable under *Klaxon* are required in others. To the contrary, the Sixth Circuit held that, under *Zicherman*, federal choice of law rules must be applied to Warsaw Convention

cases--period. *Bickel*, 83 F.3d at 130-31. And, the Second and Ninth Circuits held that, under *Zicherman*, state choice of law rules applicable under *Klaxon* must be applied to Warsaw Convention cases--period. *Pescatore*, 97 F.3d at 4-5, 12-13; *see also Insurance Co. of North America*, 189 F.3d 920-21.

There is no logical way to reconcile this split of authority among the Sixth Circuit, the Second and Ninth Circuits, and, now, the Eighth Circuit. This choice of law issue in Warsaw Convention cases is important, because it impacts "all international transportation of persons, baggage or goods performed by aircraft for hire" and "appl[ies] equally to gratuitous transportation by aircraft performed by an air transportation enterprise." WARSAW CONVENTION, art. 1. The way in which the United States of America applies the Warsaw Convention is by necessity an issue with worldwide implications for air travel and international commerce.

II. The Decision of the Eighth Circuit is Incorrect because Federal Choice of Law Rules Apply in Federal Question Cases.

The Eighth Circuit's decision was incorrect in holding that application of the forum state's [*i.e.*, Arkansas's] choice of law rules--as opposed to federal choice of law rules--was appropriate in this case under this Court's holding in *Zicherman*, as interpreted by the Sixth Circuit in *Bickel*. The issue of when federal courts are or are not to apply federal choice of law rules is an important matter of federal procedure that can only be resolved by this Court.

As noted above, this Court held that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable

under the forum's choice of law rules." *Zicherman*, 516 U.S. 231 (emphasis added). Maddox would submit that the Sixth Circuit correctly interpreted *Zicherman* to require the application of federal choice of law rules in Warsaw cases, *see Bickel*, 83 F.3d at 130, consistent with scores of other federal courts that have applied federal choice of law rules in non-Warsaw federal question cases.

In non-Warsaw cases where federal jurisdiction is based on a federal question rather than on diversity, "federal choice of law rules determine which state's substantive law should apply" to the case. *American Home Assurance Co. v. L&L Marine Serv., Inc.* 153 F.3d 616, 618 (8th Cir. 1998) (admiralty case); *see also Bickel*, 83 F.3d t 131 (Warsaw Convention case); *Brotherhood of Locomotive Engineers v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 25 (1st Cir. 2000), *cert. denied*, 531 U.S. 1014 (2000) (Railway Labor Act case); *Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) (Federal Sovereign Immunities Act case); *Edelman v. Chase Manhattan Bank*, 861 F.2d 1291, 1294 (1st Cir. 1988) ("In making our choice, we are guided by conflict of law principles that are themselves a matter of federal common law. This is so, as the district court correctly determined, because our jurisdiction in this case is based on the presence of a federal question.") (Edge Act case); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 (3rd Cir. 1992) (ERISA case); *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (bankruptcy case); *In re Holiday Airlines Corp.*, 620 F.2d 731, 734 (9th Cir. 1980), *cert. denied*, 449 U.S. 900 (1980) (Federal Aviation Act case); *Detroit Edison Co. v. Pacific Ins. Co.*, 742 F. Supp. 287, 289 (M.D.N.C. 1990) ("[F]ederal courts, not sitting in diversity, should apply a federal common law of conflicts to select the proper state law.") (CERCLA case); *Pfizer Inc. v. Elan Pharmaceutical Research Corp.*, 812 F. Supp. 1352,

1359 (D. Del. 1993) (patent infringement case) ("In federal question cases, federal courts are directed to apply a federal common law choice of law rule to determine which jurisdiction's substantive law should apply.").

Zicherman should logically require, as the Sixth Circuit so held, the uniform application of federal choice of law rules in a Warsaw case. This Court noted that the Warsaw Convention functions as a "pass-through," authorizing the application of "the law that would govern in the absence of the Warsaw Convention." 516 U.S. at 229. And, this Court further noted that the Warsaw Convention does not empower courts to develop a common law rule that will supersede "the normal federal disposition." *Id.* There is no question but that the "normal federal disposition" of a federal question jurisdiction case that also involves state law includes the application of federal choice of law rules. For that reason, the Sixth Circuit in *Bickel* obeyed the letter and the spirit of this Court's pronouncement in *Zicherman* by treating the choice of law analysis exactly like any other federal question case by applying the federal choice of law rules. *Bickel* 83 F.3d at 130. Courts like the Ninth Circuit in *Insurance Company of North America*, and the Eighth Circuit below, actually violate this Court's pronouncement in *Zicherman*. These courts improperly have created a new federal common law by grafting the *Erie* doctrine and the *Klaxon* rule from diversity jurisdiction cases onto federal question cases to which they have never applied. *See, e.g. Insurance Co. of North America*, 189 F.3d at 919-20 (relying on *Erie* and *Klaxon*).

As a general principal, federal court cases arising under federal question jurisdiction follow federal choice of law rules that track the Restatement (Second) of Conflict of Laws. *See, e.g., Edelmann*, 861 F.2d at 1295 (finding that

"in the absence of guidance from Congress" the First Circuit will "turn to the Restatement (Second) of Conflict of Laws"); *Bickel*, 83 F.3d at 130 ("In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflict of Laws . . . ."); *Chuidian*, 976 F.2d at 564 ("Federal common law follows the approach of the Restatement (Second) of Conflict of Laws"); *American Home Assurance*, 153 F.3d at 618-19 ("The parties agree that the 'most significant relationship test' established in Restatement (Second) of Conflict of Laws § 188 provides the modern analysis as to which contacts should be taken into account.").

Exceptions to the application of the Restatement exist, for example, where Congress has provided a choice of law rule, or where federal courts must simply apply the substantive federal law and have no option to choose state law. *See, e.g., Richards v. United States*, 369 U.S. 1, 10-13, 82 S. Ct. 585, 591-93, 7 L. Ed. 492 (1962) ("We conclude that Congress has, in the Tort Claims Act, enacted a rule which requires federal courts, in multistate tort cases, to look in the first instance to the law [including the choice of law rules] of the place where the negligence took place."); *Gluck*, 960 F.2d at1179-86 (looking to federal Treasury Regulations to determine the federal choice of law rule in an ERISA case); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) ("A court, subject to constitutional restrictions, will follow a statutory directive . . . on choice of law.").

In this case, the difference between the application of Arkansas's choice of law rules and the federal choice of law rules was outcome-determinative. Applying Arkansas's choice of law rules to this case, the courts below concluded that they were required to apply Oklahoma law on prejudgment interest only if prejudgment interest would be

characterized as "procedural" rather than "substantive." App. C at 18a; App. B at 11a. The courts below found that prejudgment interest was "procedural" and, therefore, refused to award prejudgment interest in accordance with Oklahoma law. App. C at 18a-20a; App. B at 11a.

Had the courts below properly applied the federal choice of law rules embodied in the Restatement, they necessarily would have concluded that Maddox was entitled to prejudgment interest provided Oklahoma law because Oklahoma law applied for determining the damages on which the interest accrued. While the courts below relied on the "procedural" label in refusing to award prejudgment interest, the federal/Restatement approach specifically disavows use of the "substantive" and "procedural" labels as a means for determining when to apply (or not to apply) the law of a non-forum state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, Comment b.

The correct inquiry for the courts below under a federal choice of law analysis would have been to determine whether prejudgment interest is a matter "prescribing how litigation shall be conducted":

> A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122. Thus, rather than looking to whether a matter has been labeled "procedural" as does the Arkansas rule, the federal choice of law analysis looks to whether or not the matter prescribes how litigation shall be conducted. *See Hystro Products, Inc. v.*

MNP Corp., 18 F.3d 1384, 1387 (7th Cir. 1994) ("The Second Restatement of Conflicts has abandoned the 'substantive/procedural' dichotomy in favor of a rule generally favoring application of the forum law on issues concerning the conduct of litigation . . . ."); *In re Kaiser Steel Corp.*, 87 B.R. 154, 159 (Bankr. D. Colo. 1988) ("[T]he approach of the Restatement (Second) [ ] eliminates the 'substantive' vs. 'procedural' dichotomy and instead focuses directly on the particular issue or type of action in deciding the conflict of laws question before the Court.").

Thus, under the Restatement approach, prejudgment interest would have been part and parcel of the otherwise applicable Oklahoma law. The courts below would certainly not determine that prejudgment interest is a matter that prescribes "how litigation shall be conducted." RESTATEMENT § 122. Rather, Oklahoma cases expressly recognize that, far from dealing with "judicial administration" or "how litigation shall be conducted," the purpose of prejudgment interest is to compensate a wronged party:

> Prejudgment interest compensates the plaintiff for the loss of use of his compensatory damages from the time the cause of action accrued until the date of judgment; money to which the plaintiff is entitled.

Carney v. State Farm Mut. Automobile Ins. Co., 877 P.2d 1113, 1118 (Okla. 1994) (*quoting Fleming v. Baptist Gen. Convention of Okla.*, 742 P.2d 1087, 1096 (Okla. 1987)) (emphasis added). Prejudgment interest has nothing to do with the means or manner by which Oklahoma state courts conduct their litigation. Indeed, this Court has also recognized the same fact in federal litigation, and has implicitly adopted the approach of the Restatement. *See*

Monessen v. Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335-36 (1988) ("Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. . . . [P]rejudgment interest constitutes too substantial a part of a defendant's potential liability under the FELA for this Court to accept a State's classification of a provision . . . as a mere 'local rule of procedure.'").

For these reasons, it was error for the Eighth Circuit to have applied Arkansas choice of law rules and not the federal rules. The error committed by the Eighth Circuit will be multiplied in future federal question cases unless this Court grants certiorari and defines the proper choice of law analysis for federal courts in these cases.

III. The Decision of the Eighth Circuit is Incorrect and Splits with Decisions of the Second and Tenth Circuits Concerning the Effect of Parties' Choice of Law Stipulations.

In this case, American stipulated that "Oklahoma law applies to damages issues in this lawsuit" (the "Stipulation"). Although the district court awarded damages in accordance with Oklahoma law, it refused to award prejudgment interest in accordance with Oklahoma law.

The decision of the Eighth Circuit is incorrect to the extent that it found that a choice of law analysis was necessary in the first place, and the decision is in direct conflict with decisions of the Second and Tenth Circuits. Under this Court's holding in *Monessen*, the question of what constituted the proper measure of damages under Oklahoma law necessarily included the question of whether prejudgment

interest should be awarded under Oklahoma law. 486 U.S. at 335 ("The question of what constitutes 'the proper measure of damages' under the FELA necessarily includes the question whether prejudgment interest may be awarded to a prevailing FELA plaintiff."). *See also Zicherman*, 516 U.S. at 229 (stating that this Court was "spared" the choice of law issue because the parties had stipulated United States federal law applied to damages); *see also Bickel*, 83 F.3d at 130 n.2 ("[T]he *Zicherman* Court did not have to address this issue [*i.e.*, the choice between federal or forum state choice of law rules] because of the parties' stipulation that United States law applied.").

Prejudgment interest is clearly a "damages issue" within the meaning of the Stipulation filed by American in federal court. *Monessen*, 486 U.S. at 335; *Johnson*, 964 F.2d at 1063 ("To the contrary, we find it significant that the Restatement expressly couples prejudgment interest with the broader damages issue."); *see also Caruolo v. John Crane, Inc.*, 226 F.3d 46, 59 (2nd Cir. 2000) ("Prejudgment interest, like other damages issues, is an aspect of loss-allocation."); *Cappello v. Duncan Aircraft Sales of Florida, Inc.*, 79 F.3d 1465, 1476 (6th Cir. 1996) ("We have carefully reviewed the two damages issues raised by plaintiffs that the district court erred . . . in refusing to award prejudgment interest."); *Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1072 n.5 (8th Cir. 1991) ("Here, we need not address the damage issue other than in our remand of the prejudgment interest claim . . ."). Therefore, the decision of the Eighth Circuit below conflicts with this Court's and lower federal courts' treatment of prejudgment interest as a "damages issue."

The decision of the Eighth Circuit most directly conflicts with the decisions of two other circuits that have

addressed the identical issue in this case in similar contexts. The case of *Vasina v. Grumman Corp.* involved the crash of a Navy airplane manufactured by Defendant. 644 F. 2d 112, 114 (2nd Cir. 1981). At trial, Defendant stated that it was "happy" with the application of New York law "as to the measure of damages." *Id.* at 118. On appeal from a judgment that included an award of prejudgment interest under New York law, however, Defendant argued that Oregon law should apply to the issue of prejudgment interest. *Id.* The Second Circuit rejected Defendant's argument:

> [Defendant] explicitly accepted the application of New York law respecting damages. And as [Defendant] concedes in its brief on appeal, New York law "specifically provides for prejudgment interest." [Defendant] seems to want to pick and choose between the laws of Oregon and New York to suit its own advantage. We reject this "smorgasbord" approach.

Id. at 119.

Johnson v. Continental Airlines involved the crash of Continental Flight 1713 in Denver, Colorado. 964 F.2d 1059, 1060 (10th Cir. 1992). At issue on appeal was which state's law governed the availability of prejudgment interest where, by consent, a particular state's (Idaho's) law governed compensatory damages. *Id.* Plaintiffs had consented to the application of Idaho law on "compensatory damages issues," but, on appeal, argued for application of Colorado law for purposes of prejudgment interest. *Id.* at 1064. The Tenth Circuit determined that, "[l]ogically, the same law should govern all issues related to compensating a plaintiff for the

injury suffered." *Id.* at 1063. And, citing *Vasina*, the court rejected Plaintiffs' argument:

> [W]e reject Plaintiffs' attempt to pick and choose prejudgment interest law in the present case. Plaintiffs agreed Idaho law would govern compensatory damages issues.

Id. at 1064.

The issue presented in this case is indistinguishable from the issue presented in *Vasina* and *Johnson*, and the Eighth Circuit's decision is incorrect and in conflict with those circuits. This Court should grant certiorari to resolve the split, and clarify whether parties in federal court can rely upon choice of law stipulations, or whether those stipulations are subject to second guessing by a remorseful litigant. A decision by this Court would be useful guidance for lower courts in dealing with stipulations generally.

IV. The Questions Presented are Important for Maintaining a Uniform Choice of Law Analysis in Warsaw Convention Cases and Other Federal Question Cases.

The Eighth Circuit's decision below has further complicated the choice of law issue in Warsaw Convention cases by creating a three-way circuit split on the issue. The circuit split will lead to tremendous uncertainty as to the application of choice of law rules. In future Warsaw cases, federal courts are now left to wonder whether to (a) apply federal choice of law rules in all cases; (b) apply forum state choice of law rules in all cases; or (c) apply federal choice of law rules in some cases, and state choice of law rules in others.

In *Zicherman*, this Court observed that, although "it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel, but . . . this [*i.e.*, creating a federal rule of damages] is not an area in which the imposition of uniformity was found feasible." 516 U.S. at 230. The Second Circuit appears to have misperceived *Zicherman* (which reversed the Second Circuit) as proscribing an attempt at uniformity for choice of law rules in Warsaw Cases. *See Pescatore*, 97 F.3d at 11. Indeed, neither the Ninth Circuit's decision nor the Eighth Circuit's decision below interpreted *Zicherman* in a manner that promotes uniformity.

A brief hypothetical based on the facts of this case may serve to illustrate why reliance on state choice of law rules undermines the uniformity intended by the Warsaw Convention. Assume that an American Airlines jet crashes in Arkansas, injuring among its international-flight passengers two domiciliaries of Oklahoma. The Judicial Panel on Multidistrict Litigation orders all of the federal cases consolidated in the Eastern District of Arkansas, just as in this case. Passenger A, recognizing that her case will ultimately be heard in the Eastern District, files her suit a federal district court in Little Rock. Passenger B, however, files his original complaint in the Northern District of Texas, where American's principal office is located. Passenger B's case is promptly transferred to the Eastern District of Arkansas and consolidated with the other Multidistrict Litigation.

Both Passenger A's and Passenger B's cases are tried before a Little Rock jury two years later, but Oklahoma law is applied to determine damages in each passenger's case since the passengers are Oklahoma residents. Having similar injuries, each passenger is awarded an equal sum of damages.

What will happen if the two passengers both request the prejudgment interest provided under Oklahoma local law?

If the choice of law rules of the state in which suit is filed must be followed--as has been held by the Eighth Circuit below and the Ninth Circuit--Arkansas choice of law rules will apply to Passenger A's case but not Passenger B's case. Passenger A will receive no prejudgment interest, despite the fact that an Oklahoma court would have awarded it as compensation. Arkansas choice of law rules declare prejudgment interest to be "procedural," and thus will follow the Arkansas forum's law that does not provide for the interest.

Passenger B, though also an Oklahoma resident with similar injuries, would obtain a better outcome because he engaged in forum-shopping by filing his original complaint in Texas, even though it was immediately transferred to the federal court in Arkansas. If the trial court is obligated to apply the *Klaxon* and *Van Dusen* rules, Passenger B's case will be governed by Texas choice of law rules. *See Van Dusen v. Barrack*, 376 U.S. 612, 635-37 (1964) (applying *Klaxon v. Stentur Elec. Mfg. Co.*, 313 U.S. 487 (1941) to cases of venue transfer). Texas is a state that follows the Restatement (Second) of Conflict of Laws. *See e.g. Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414 (Tex. 1984). The Restatement approach rejects the substantive/procedural distinction used in Arkansas. Thus, the court would determine that prejudgment interest is not a matter "prescribing the conduct of litigation." Therefore, the Texas choice of law rule would mandate that Oklahoma's prejudgment interest law be applied to the judgment.

In sum, Passenger A and Passenger B, though both Oklahoma residents with similar injuries and similar jury

awards of damages from jury trials governed by the same substantive law in the same court from the same airline crash, would receive decidedly non-uniform treatment under the Warsaw Convention. The disparate treatment serves no valid public policy purpose, and indeed would penalize Passenger A for not having forum-shopped for more favorable choice of law rules. Put another way, federal law has now encouraged future forum shopping by having specially rewarded Passenger B for his efforts.

Under the Sixth Circuit's better reading of *Zicherman*, there is no anomaly of case results because of differences in choice of law rules. All Warsaw Convention cases, being decided by the federal courts under federal question jurisdiction, are subject to the same federal choice of law rules. The *Bickel* court specifically stated that "[t]he Warsaw Convention . . . embodies a concrete federal policy of uniformity and certainty which would be undermined by the use of state choice of law rules," and that "[n]othing in the Supreme Court's recent *Zicherman* opinion suggests that crafting a special federal choice of law rule in these cases is inappropriate." *Bickel*, 83 F.3d at 130 & n.2 (citations omitted). As among the decisions in *Bickel*, *Pescatore*, *Insurance Company of North America*, and the Eighth Circuit's decision below, surely *Bickel* best advances the letter and the spirit of this Court's holding in *Zicherman*.

As this Court has observed more recently, "The cardinal purpose of the Warsaw Convention . . . is to 'achieve uniformity of rules governing claims arising from international air transportation.'" *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169 (1999) (*citing Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)); *see also id.* at 169 ("The Court of Appeals looked to our precedent for guidance on this point, but it misperceived our meaning. It misread our

decision in *Zicherman* to say that the Warsaw Convention expresses no compelling interest in uniformity that would warrant preempting an otherwise applicable body of law, here New York tort law.") (citations omitted).

While the imposition of a uniform federal damages law in international air travel might not be feasible, *Zicherman*, 516 U.S. at 230, surely the application of uniform and predictable choice of law rules in Warsaw cases filed in federal courts is not only feasible, but also advances "the predictability that adherence to the treaty has achieved worldwide." *El Al Israel*, 525 U.S. 171. A grant of certiorari in this case would do much to advance the policy favoring predictability in Warsaw Convention cases, and would also give this Court an opportunity to clarify when the application of federal choice of law rules is appropriate.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert R. Bodoin
Counsel of Record for Petitioner

John C. Burnside
Mark Edwin Burge
BODOIN, BURNSIDE & BURGE, P.C.
6115 Camp Bowie Blvd., Suite 290
Fort Worth, Texas 76116
Phone: (817) 377-1654
Fax: (817) 377-1213

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3715

[Filed September 16, 2002]

Kristin Maddox,	)
Appellant,	)
	)
v.	)
	)
American Airlines, Inc.,	)
Appellee.	)
	)

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

September 16, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3715

[Filed August 1, 2002]

Kristin Maddox,	)
Appellant,	)
	)
v.	)
	)
American Airlines, Inc.,	)
a Delaware Corporation,	)
Appellee.	)
	)

Appeal from the United States District Court
for the Eastern District of Arkansas

JUDGES:
Before McMILLIAN, BEAM, and HANSEN,[1] Circuit Judges.

[1] Judge David R. Hansen became Chief Judge of the United States Court of Appeals for the Eighth Circuit on February 1, 2002.

OPINION

HANSEN, Circuit Judge.

A federal jury awarded Kristin Maddox over $11,000,000 in damages for personal injuries she suffered while she was a passenger on an American Airlines international flight that crashed in Little Rock, Arkansas. She now appeals, challenging the district court's rulings regarding prejudgment and postjudgment interest rates. We affirm with the exception of one minor issue on which the parties agree.

I.

Kristin Maddox, a resident of Oklahoma, was a passenger on American Airlines Flight 1420 when it crashed after running out of runway while landing at Little Rock, Arkansas, on June 1, 1999. Eleven people died as a result of the crash and many, like Ms. Maddox, were severely injured. Prior to the crash, Ms. Maddox had been a music major with an emphasis in vocal operatic performance and a minor in piano performance at Ouachita Baptist University. On the night of the crash, she was returning from Europe where she had been touring and performing with her college choir. Ms. Maddox suffered severe smoke and toxic fume inhalation that damaged her lungs and vocal chords, destroying her ability to sing. She also suffered severe burns to her hands and arms, impairing her ability to play a keyboard instrument of any kind.

Ms. Maddox filed suit in federal court in Arkansas seeking damages for her injuries. Prior to trial, American Airlines made payments to Maddox for medical expenses totaling $134,453. American Airlines conceded liability,

leaving the amount of damages due as the only issue for trial, and it does not cross appeal the jury's damage award.

Because Maddox had been a passenger on an international flight, her claims are governed by the Warsaw Convention. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, Oct. 12, 1929 (Warsaw Convention), 49 Stat. 3000, 3014 (1934), *reprinted in note following* 49 U.S.C. § 40105 (1994). [HN1] Article 17 of the Warsaw Convention governs the liability of international air carriers for accidents in which a passenger is wounded on an international flight. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 162, 142 L. Ed. 2d 576, 119 S. Ct. 662 (1999). Article 22 creates monetary liability limits on damage awards against an international airline. *Id.* at 163 n.7. Recognizing that the liability limits of the Warsaw Convention, signed in 1929 and amended in 1955, are now inadequate in most countries, a group of international airlines, including American Airlines, has taken action to waive the Convention's liability limits through a series of agreements. *See Lloyd v. Am. Airlines, Inc.*, 291 F.3d 503, 506 n.2 (8th Cir. 2002). Among the agreements supplementing the Warsaw Convention is the International Air Transport Association Intercarrier Agreement on Passenger Liability (the IATA Intercarrier Agreement). (Appellee's Add. at 3.) With listed exceptions for certain routes which do not apply to this case, the measures implementing the IATA Intercarrier Agreement impose absolute liability on an international carrier to the extent of 100,000 Special Drawing Rights

(SDRs).[2] (*Id.* at 5.) For claims exceeding this amount, limited defenses are available to the airlines under the Warsaw Convention, but [HN2] in all cases in which a passenger has been wounded in an accident, the IATA Intercarrier Agreement waives the Warsaw Convention's limitation of liability "on recoverable compensatory damages . . . so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger." (*Id.* at 3.) The provisions are implemented in the carrier's tariffs and the contract of carriage between the carrier and its passenger. The passenger's domicile in this case is Oklahoma, and prior to trial, American Airlines stipulated that "Oklahoma law applies to damages issues in this lawsuit." (J.A. at Tab 6.)

Following trial, the jury returned a general verdict form fixing damages at $11,015,000. The district court entered judgment in favor of the plaintiff in this amount and ordered that the judgment bear postjudgment interest at the rate of 6.375% pursuant to federal statute. Maddox moved to amend the judgment, requesting prejudgment interest in accordance with Oklahoma law and requesting that the judgment bear postjudgment interest at Oklahoma's rate of

---

[2] SDRs are a type of international monetary reserve currency or accounting system created in 1968 by the International Monetary Fund, *see* http://www.encyclopedia.com/articles/12191.html, which is a specialized agency of the United Nations that determines the value of SDRs relative to the currencies of the five largest exporting nations, *see* http://www.encyclopedia.com/articles/23338.html. The parties agree that American Airlines' advance payment of $134,453 was the equivalent of 100,000 SDRs.

8.73% as opposed to the federal rate of 6.375%. Also, both parties agreed that the judgment should be amended to deduct from the total damage award the pretrial SDR payments made by American Airlines to Maddox in the amount of $134,453.

The district court granted in part and denied in part the motions to amend the judgment. *Maddox v. Am. Airlines, Inc.*, 115 F. Supp. 2d 993, 996 (E.D. Ark. 2000). Specifically, the district court denied Maddox's request for any prejudgment interest on the damage award, denied Maddox's request for postjudgment interest at the Oklahoma rate, and granted the joint request to credit the judgment with American Airlines' pretrial SDR payment of $134,453. The district court also credited interest on that payment in the amount of $4,051.93, although neither party had requested this further reduction. Ms. Maddox appeals.

II.

Ms. Maddox first contends that the district court erred by applying Arkansas's choice of law rules to determine whether to award prejudgment interest because the parties had agreed by stipulation and the IATA Intercarrier Agreement that Oklahoma law would govern the damages issue. [HN3] "We review the district court's choice of law determinations de novo." *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001). Similarly, we apply de novo review to the district court's determinations of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-32, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991).

Because actions under the Warsaw Convention, an international treaty, present federal law questions, a federal

forum is available, but the Convention itself does not include a choice of law provision. The Supreme Court has indicated that Article 17 of "the Warsaw Convention permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231, 133 L. Ed. 2d 596, 116 S. Ct. 629 (1996). Thus, Article 17 is a "pass-through" provision which, absent special federal legislation applicable to Warsaw Convention cases, provides nothing more than an authorization to apply whatever law would govern in the absence of the Warsaw Convention. *Id.* at 229; *see also Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 920 (9th Cir. 1999); *Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1029 (2d Cir. 1996), *cert. denied*, 519 U.S. 1116, 136 L. Ed. 2d 845, 117 S. Ct. 959 (1997).

While ordinarily the choice of law rules of the forum would apply to determine the applicable law that governs what harm is legally cognizable, the IATA Intercarrier Agreement and its implementing provisions make an express choice of law applicable to this case, stating that "recoverable compensatory damages" will be determined by reference to the law of the passenger's domicile or permanent residence, which is Oklahoma in this case. (Appellee's Add. at 3, 5.) Also, American Airlines agreed in a pretrial stipulation that the "damages issues" in this lawsuit should be governed by Oklahoma law. (J.A. at Tab 6.) Accordingly, the district court properly chose to apply Oklahoma's law on damages generally. Ms. Maddox argues that prejudgment interest **[**9]** is within the meaning of "recoverable compensatory damages" under the IATA Intercarrier Agreement and its implementing provisions or within the term "damages issues"

as used in the stipulation, and therefore prejudgment interest should have been awarded according to Oklahoma law, and not denied under Arkansas law.

The applicable agreements do not define the terms "recoverable compensatory damages" or "damages issues." Thus, we look to Oklahoma law to determine whether prejudgment interest may be characterized as within their meanings. By [HN5] statute, Oklahoma law requires prejudgment interest to be added to a personal injury judgment from the date when the lawsuit was filed, Okla. Stat. tit. 12, § 727(E), but prejudgment interest is not itself a measure of compensatory damages. The courts of Oklahoma have expressly stated that "prejudgment interest under § 727 is not of the substance of the right of action." *Shoemaker v. First Nat'l Bank & Trust*, 2000 OK CIV APP 97, 11 P.3d 1265, 1267 (Okla. Civ. App. 2000). Oklahoma courts consider prejudgment interest to be procedural only, and not a substantive right. *Fields v. Volkswagen of Am., Inc.*, 1976 OK 106, 555 P.2d 48, 63 (Okla. 1976) (holding that prejudgment interest is procedural only so the statute applies to a case even where the suit was filed before the legislation became effective). Because prejudgment interest is recoverable by statute as a cost of litigation, it is not an element of damages under Oklahoma law. *Benson v. Blair*, 1973 OK 102, 515 P.2d 1363, 1365 (Okla. 1973) (addressing the retrospective application of the statute). Even though the Oklahoma courts indicate that prejudgment interest is mandated as a monetary recovery that is intended to compensate for the lost use of the money awarded as damages, prejudgment interest does not itself rise to the level of an element of damages in the personal injury claim. *Carney v. State Farm Mut. Auto. Ins. Co.*, 1994 OK 72, 877

P.2d 1113, 1118 (Okla. 1994); *Fleming v. Baptist Gen. Convention*, 1987 OK 54, 742 P.2d 1087, 1096 (Okla. 1987); *see also Burwell v. Okla. Farm Bureau Mut. Ins. Co.*, 1995 OK CIV APP 50, 896 P.2d 1195, 1199 n.4 (Okla. Ct. App. 1995) (noting that an award of interest "is a sum added to a judgment--not part of the judgment").

Ms. Maddox argues that a recently decided case from the Supreme Court of Oklahoma indicates that the Oklahoma courts now consider prejudgment interest as "recoverable compensatory damages" or as a "damages issue" because the court expressly states that prejudgment interest is "an item of damages owed for the delayed satisfaction of an obligation." *McDonald v. Schreiner*, 2001 OK 58, 28 P.3d 574, 577 (Okla. 2001). We disagree with her assertion that this statement renders prejudgment interest an element of damages in a personal injury case. The court noted that prejudgment interest may be characterized as "damages" owed for the delay in use of the money judgment, but the court also goes on to clearly state that this delay "constitutes an expense incident to the chosen course of litigation." *Id.* (emphasis omitted). In other words, prejudgment interest remains a cost of litigation. *See id.*

Because prejudgment interest is not characterized as an element of damages or as "recoverable compensatory damages" under Oklahoma law, the issue of prejudgment interest is not governed by the choice of law provision of the IATA Intercarrier Agreement or the pretrial stipulation in this case. *But see Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059, 1064 (10th Cir. 1992) (holding under Idaho law that prejudgment interest is not subject to an independent choice of law analysis apart from the issue of compensatory

damages). Absent an express choice of law, the Warsaw Convention leaves "the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." *Zicherman*, 516 U.S. at 231. Ms. Maddox argues that the district court erred by not applying the federal choice-of-law rules, asserting a split in the circuits regarding whether to interpret "forum" as referring to the federal court or the state in which the court sits. In *Pescatore v. Pan Am. World Airways*, 97 F.3d 1, 9 (2d Cir. 1996), and *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 920 (9th Cir. 1999), each court concludes that the forum state's choice of law rules should apply. The courts reason that the state law governs because Zicherman declared Article 17 to be a pass-through provision, which merely authorizes courts to apply the law that would govern in its absence. *Pescatore*, 97 F.3d at 9; *Fed. Express Corp.*, 189 F.3d at 920. The "contrary" Sixth Circuit case simply presented a different factual scenario. In *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130-31 (6th Cir. 1996), *vacated in part on separate issue, 96 F.3d 151 (6th Cir. 1996),* the case did not involve citizens of different states but of different countries. Similarly, in *Zicherman*, the accident occurred on the high seas, and the choice of law was first a choice between foreign law or the laws of the United States, making federal forum choice-of-law rules applicable.

The present case is more akin to the Second and Ninth Circuit cases in which no federal statute furnished a rule of law with respect to damages. The accident clearly occurred in Arkansas, and state-law personal injury damages were at issue, not federal substantive law. Thus, federal choice-of-law rules were not implicated.

We conclude that the district court correctly considered and applied Arkansas's choice-of-law rules to the issue of prejudgment interest. The district court determined that Arkansas's choice-of-law rules dictated that it should apply the substantive law of Oklahoma. However, because Oklahoma considers prejudgment interest as procedural only and not substantive, Arkansas law, the law of the forum, would apply to the prejudgment interest issue, and prejudgment interest would not be allowed under Arkansas law. We find no error in the district court's application of Arkansas's choice of law principles, and Ms. Maddox challenges only the choice of the law applied by the district court; she does not assert that the district court incorrectly concluded that she is not entitled to prejudgment interest under Arkansas law as it presently exists.

III.

Ms. Maddox next argues that she is entitled to postjudgment interest on the verdict at the rate prescribed by Oklahoma law, rather than the rate prescribed by federal law as applied by the district court because the parties' choice of law to govern damages issues also extends to the issue of postjudgment interest. We disagree. A federal statute prescribes the relevant postjudgment interest rate and dictates that [HN6] "interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C.A. § 1961(a) (1994). We have specifically held that, [HN7] unless a case is expressly exempt from the scope of this statute, the federal postjudgment interest rate applies to cases adjudicated in federal court, regardless of whether the basis for jurisdiction was federal question or diversity. *See, e.g., Happy Chef Sys., Inc. v. John Hancock Mut. Life Ins. Co.*,

933 F.2d 1433, 1435 (8th Cir. 1991) ("In a diversity action, state law governs prejudgment interest; federal law governs postjudgment interest."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Knudsen*, 749 F.2d 496, 497 (8th Cir. 1984) (holding that because § 1961(a) does not exempt diversity actions from its scope, "federal, not state law, determines the interest rate in such actions"); *Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-86 (8th Cir. 1983). Accordingly, the district court properly applied the federal rate of postjudgment interest.

Finally, both parties agree that the district court should not have deducted from the verdict an amount representing interest on the pretrial SDR payments in light of the court's refusal to add prejudgment interest on the judgment. We agree, and accordingly, we reverse the portion of the district court's judgment that reduces the verdict by an amount representing interest on the SDR payments ($4,051.93). The verdict should have been reduced only by the actual amount of payments made as SDRs.

IV.

Accordingly, we reverse the district court's decision to deduct from the verdict interest on the SDR payments, and we remand for entry of an amended judgment that reduces the verdict only by the actual amount of the SDR payments–$134,453. In all other respects, we affirm the judgment of the district court. Finally, we overrule American Airlines' motion to strike both the appellant's Rule 28(j) letter and her response to American's Rule 28(j) citation.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. 4:00CV00135 HW

[Filed September 25, 2000]

KRISTIN MADDOX)
Plaintiff)
v.)
)
AMERICAN AIRLINES,)
INC.)
Defendant)
)

ORDER

Plaintiff Kristin Maddox ("Maddox") has filed a motion to amend the judgment. *See* Document 72. Defendant American Airlines, Inc., ("American") has also filed a motion to alter or amend the judgment. *See* Document 74. The Court has reviewed the motions and finds that they should be, and are, granted in part and denied in part.

It is undisputed that on August 28, 2000, the Court, on the basis of the jury's verdict, entered judgment for Maddox in the amount of $11,015,000.00. The judgment also contained the following provision: "This judgment shall bear

interest thereon at the legal rate of 6.375% as provided by law until paid." See Document 74, Exhibit 1. The judgment did not contain an award of pre-judgment interest nor did it contain a credit to American in an amount equal to the special drawing rights ("SDR") payment made to Maddox pursuant to the terms of the Warsaw Convention.

Following the entry of judgment, Maddox filed her motion to amend. In the motion, she asked that the judgment be amended in the following respects:

> (a) that, in accordance with Oklahoma law, prejudgment interest be added to her damage award; (b) that certain sums heretofore paid by [American] be deducted from her damage award; and, (c) that the Judgment bear post-judgment interest at the rate of 8.73% as provided by Oklahoma law, until paid.

See Document 72 at 1. American thereafter filed its motion to alter or amend the judgment. American, in its motion, asked that the judgment be amended to reflect the SDR payment made to Maddox. American specifically alleged the following in its motion:

> At the hearing conducted immediately prior to the beginning of that in this matter, the Court ruled from the bench that the Defendant would be given a credit against any Judgment in an amount equal to the special drawing rights (SDR) payment made to the Plaintiff pursuant to the terms of the Warsaw Convention Treaty.

> The present Judgment ... does not reflect this SDR credit.
>
> Documentation of the SDR credit in the amount of One Hundred Thirty Four Thousand Four Hundred Fifty Three Dollars ($134,453.00) was admitted into evidence as Plaintiff's Exhibit "126", without objection. However, consistent with the Court's ruling, this exhibit was not made available to the jury...
>
> In light of this Court's ruling that the SDR payment would be credited against any Judgment rendered against the Defendant and the fact that the present Judgment does not reflect said credit, the Defendant moves the Court to alter or amend the Judgment to reflect a credit of $134,453.00.

See Document 74 at 1-2. American also submitted a response to the motion to amend filed by Maddox. Its response was two-fold. First, although American acknowledged that Oklahoma law provides for pre-judgment interest, the law is procedural and therefore not binding on the Court. Second, American took the position that the Court had applied the proper post-judgment interest rate, *ie.*, the federal rate of post-judgment interest.

Turning to the matters addressed in the motions, the Court finds that two of the three matters are easily resolved. First, the Court previously determined, and the parties agree, that American is entitled to a credit for its SDR payment to

Maddox in the amount of $134,453.00. American is also entitled to a credit equal to the interest on the SDR payment, that being, $4,051.93. The judgment will be so amended, specifically, the amount of the judgment will be reduced to $10,876,495.07.[1] Maddox's motion to amend is granted in this one respect; American's motion to alter or amend is granted.

Second, with respect to the rate of post-judgment interest, the Court will not apply the Oklahoma rate but will instead apply the federal rate. The prevailing view in the Eighth Circuit is that federal law-28 U.S.C. 1961(a)--governs an award of post-judgment interest in a case arising out of federal court, even if federal court jurisdiction is based upon diversity of citizenship. *See Weitz Company, Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382 (8th Cir. 1983). Maddox's motion to amend is denied in this respect.

The matter of pre-judgment interest is not as easily resolved. In considering the matter, the Court is guided by the United States Supreme Court decision in *Zicherman v. Korean Airlines Co.*, 516 U.S. 217 (1996). It provides that in cases governed by the Warsaw Convention, the specification of what damages are legally cognizable is left to the domestic law applicable under the forum's choice-of-law rules as if the Warsaw Convention was inapplicable.

---

[1] The amended amount of $10,876,495.07 is arrived at by subtracting $134,453.00 (the SDR payment) and 4,051.93 (the interest on the SDR payment) from $11,015,000.00.

Maddox, a resident of Oklahoma, commenced the case at bar in Arkansas pursuant to the provisions of the Warsaw Convention. Thus, Arkansas is the forum in this case. The Arkansas choice-of-law rules require the application of another state's law only if the relevant law would be characterized as substantive rather than procedural. *See Doan v. Consumer Testing labs, Inc.*, 2 F.Supp.2d 1209 (W.D.Ark. 1998) (Waters, J.) [citing *Sentry Insurance Co. v. Stuart*, 246 Ark. 680,439 S.W.2d 797 (1969) and *American Physicians Insurance. Co. v. Hruska*, 244 Ark. 1176, 428 S.W.2d 622 (1968)].

The parties in the case at bar agreed that Oklahoma law would be applied. In accordance with that agreement, the Court gave the Oklahoma damage instruction requested by both parties. *See* Oklahoma Uniform Jury Instruction 4.1. It was clearly proper to do so because the instruction was part of the Oklahoma substantive law. Is the Oklahoma statute governing pre-judgment interest part of the Oklahoma substantive law or is it one of procedure? The Court finds that it is one of procedure and, for that reason, it will not be followed.

The measure of damage is typically treated as a substantive matter, *see* Robert A. Leflar, American Conflicts Law, section 126 (4th ed. 1986), and there is support for the proposition that pre-judgment interest is an element of damage awarded to provide full compensation by converting time-of-demand damage into time-of-verdict damage, *see Simeone v. First Bank National Association*, 73 F.3d 184 (8th Cir. 1996). Oklahoma, however, does not so construe its pre-judgment interest statute. First, the Oklahoma Supreme Court construes the statute as a procedural matter and not a substantive matter.

See Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); *Benson v. Blair*, 515 P.2d 1363 (Okla. 1973). Second, the Oklahoma Supreme Court does not consider interest to be an element of damage in a personal injury action. *See Fleming v. Baptist General Convention of Oklahoma*, 742 P.2d 1087 (Okla. 1987). In *Fleming*, the state Supreme Court provided the following:

> Interest is not an element of damages in a personal injury action. [Citations omitted]. The fact that interest is not an element of damages under Oklahoma law is discoverable from the statutory scheme of 12 O.S. Supp. 1979 [section] 727(2) in that that section specifies when a verdict for damages by reason of personal injuries is accepted by the that court, the court shall then add interest in rendering judgment. Clearly then, the legislature did not specifically classify or imply that interest was an element of damages. [Citation omitted].

See Id. 1096. Although the Court is not bound by the construction given the pre-judgment statute by the Oklahoma Supreme Court, *see Doan v. Consumer Testing Laboratories, Inc*, 2 F.Supp. at 1213, the manner in which the statute is construed by the highest court of Oklahoma is entitled to considerable weight. It is also at least worth noting that pre-judgment interest would not be available in this instance had the case been tried in accordance with Arkansas law. *See Woodline Motor Freight v. Troutman Oil Company, Inc.*, 327

Ark. 448, 938 S.W.2d 565 (1997).[2] Because the Oklahoma pre-judgment interest statute is procedural, it will not be followed. Maddox's motion to amend is denied in this respect.

In summary, Maddox's motion to amend is granted in one respect; American's motion to alter or amend is granted. The judgment will be amended to reflect the SDR payment to Maddox and interest on the SDR payment, specifically, the amount of the judgment will be reduced to $10,876,495.07. Maddox's motion to amend is denied in all other respects. The Court wilt apply the federal rate of post-judgment interest from August 28, 2000; the Court will not apply the Oklahoma pre-judgment interest statute.

IT IS SO ORDERED this 25th day of September, 2000.

/s/ _____
Henry Woods, U.S. District Judge

---

[2] In that case, the Arkansas Supreme Court noted that the award of pre-judgment interest is not dependent upon whether the action is in contract or in tort. "Prejudgment interest is allowable where the amount of damages is definitely ascertainable by mathematical computation, or if the evidence furnishes date that makes it possible to compute the amount without reliance on opinion or discretion." *See Id.* 938 S.W.2d at 568.